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JOHN T. FEY, Clerk

No. 220

Supreme Court of the United States

OCTOBER TERM, 1956

MICHIGAN NATIONAL BANK, A National Banking Association, *Petitioner*,

v.

RAY M. GIDNEY, Comptroller of the Currency, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

In the courts below petitioner asserted two alternative and completely independent grounds for the declaratory relief which it seeks. The first issue is important to the entire national banking system: it is the question whether the Congress has confined the branching power of every national banking association in the country to the limits prescribed for state banks by the law of the state in which the particular national bank is operating, or whether Congress has

given consolidated national banking institutions certain paramount Federal branching rights. It is the national importance of this first issue which in petitioner's view calls for a writ of certiorari in this case.

Petitioner's alternative claim for relief is admittedly of less importance, for it depends upon an interpretation of a Michigan statute whose effect will not be directly felt beyond the boundaries of that state. Because of this disparity in significance the petition was directed entirely to the propriety of certiorari review of the first of the foregoing issues; the second issue was reserved without discussion until such time as the Court should review the case on the merits.

Respondent appears to have mistaken the order of importance of the two issues. His Brief in Opposition is directed mainly to justifying, on the merits, the interpretation which the courts below placed upon the Michigan statute. Petitioner, however, does not think it proper to burden the Court here with an argument either on the importance or the merits of this secondary issue, and we will here limit our argument to the single, primary issue. But it should not be thought that our decision to leave the merits of the secondary issue for discussion at a later time implies a concession that respondent's position thereon is valid. If certiorari is granted, we will demonstrate that all of the available legislative materials bearing on the meaning of the Michigan statute here involved (including the legislative history and development of the statute, its internal structure, and the plain meaning of similar language in other provisions of Michigan banking law) require reversal of the holding be-

low on the secondary as well as the primary issue involved.[1]

REASONS FOR GRANTING THE WRIT

The issue which in petitioner's view calls for a grant of certiorari in this case turns upon the interpretation of the provision of Federal law which governs the consolidation of all national banks—12 U.S.C. Section 34a. Although its interpretation in this case is of manifest importance to national banks throughout the country, the Court of Appeals, as respondent observes, "apparenlty considered it unnecessary to discuss" the provision at all. Brief in Opp., p. 10. Petitioner believes that the Court of Appeals, in thus ignoring an important and clear-cut Federal issue which was placed squarely before it, has failed to perform its proper appellate function and that for this reason this Court should now grant certiorari. Without such a grant petitioner will never have had its contention considered by a Federal appellate court.

[1] In discussing the secondary issue respondent has made one assertion whose validity must be challenged here. He asserts that "the disposition of the case" depends upon construction of a state statute which has never been authoritatively construed by the state courts, and that on this ground alone this Court should decline to adjudicate the case (citing Federation of Labor v. McAdory, 325 U.S. 450 (1945)). Brief in Opp. n. 2, p. 6. The argument overlooks a number of facts: (1) in the first place, it is "the disposition" of only one of petitioner's *two alternative* claims for relief which involves the construction of a state statute, and it is the *other* wholly alternative claim upon which the grant or denial of this petition depends; (2) the state statute here involved has been incorporated by reference into and thus made a part of *Federal* law (see 12 U.S.C. Section 36(c)); (3) Meredith v. Winter Haven, 320 U.S. 228, 234-238 (1943) has made clear that the Federal courts have an affirmative *duty* to adjudicate questions of the kind presented here.

As pointed out in the petition, if 12 U.S.C. Section 34a is read as it is written, every consolidated national bank is actually the sum of its continuing constituent banks. Each of these continuing constituents retains, after consolidation, the statutory authority to branch under the terms of 12 U.S.C. Section 36, and this authority, together with other authority, by the express wording of Section 34a, may continue to be exercised, after consolidation, by the consolidated institution itself "in the same manner and to the same extent as such rights, franchises, and interests were held or enjoyed by any such constituent institution at the time of such consolidation". While that is what the statute says, respondent has construed it as though the right of the constituent banks to branch had been extinguished upon consolidation. As a result consolidated national banks throughout the country have been prevented from carrying out the expansion programs for which the Congress evidently sought to establish a statutory basis in 1933. In any case, whatever interpretation is to be placed upon 12 U.S.C. Section 34a, resolution of that interpretative issue will have deep significance to national and state banks throughout the nation.

It is most revealing that although the petition alleges that the court below "decided an important question of Federal law which has not been, but should be, settled by this Court" (Petition, p. 5), respondent's brief opposes a grant of certiorari solely on the ground that petitioner's position on the merits of the issue is erroneous. We think it fair to assume that respondent recognizes the great impact which petitioner's contentions would have upon the national banking system if they were upheld by this Court, and

such recognition, we submit, may be taken as *prima facie* evidence that certiorari review is appropriate.

Respondent, moreover, has not come forward with any persuasive reasons in support of his assertion that petitioner's claim is "meritless". For example, he states that 12 U.S.C. 36(c) was intended to tie all national bank branching rights to state law, "whether [the particular national bank is] consolidated or not", but he does not explain *why* he is entitled to ignore the consolidated status of the bank under 12 U.S.C. Section 34a. Brief in Opp., p. 13. Again, he says that 12 U.S.C. 34a, which authorizes a consolidated bank to enjoy "*all* of the rights, franchises and interests" of its continuing constituents, "is silent" as to branching rights, and from this he reasons that branching rights are somehow to be excluded from the term "all". Brief in Opp., p. 13. But 12 U.S.C. 34a does not pass *any* rights specifically; indeed its very failure to do so (*i.e.*, its use of all-inclusive language) requires the conclusion that the branching rights of the continuing constituents are to be enjoyed by the consolidated institution along with all other rights of its constituents.

Respondent also asserts that 12 U.S.C. 36(b) has some bearing upon petitioner's contention. That provision, however, was simply intended to give respondent an opportunity to test the economic propriety of certain pre-existing branches of banks participating in a consolidation before allowing such branches to continue in operation. The provision operates as follows: if a branch was in existence before February 25, 1927, it can continue in operation after the consolidation without interruption; if it was established after February 25, 1927, it must be "formally relinquished" at the time of consolidation, but, if re-

spondent then decides that its continued operation would be desirable, it can be immediately reopened without any real break in the continuity of its operation. See 36 Op. Atty. Gen. 116, 119 (1929). The full effect of 12 U.S.C. 36(b) is thus to authorize respondent to close *existing* branches upon a consolidation of national banks if he finds that economic circumstances require such action. He admittedly has the same authority to prevent consolidated banks from opening *new* branches that are economically undesirable. But neither that authority nor 12 U.S.C. 36(b) affects the legal eligibility of a consolidated bank to exercise its constituents' branching rights under 12 U.S.C. 34a.

Finally, the Court should not be misled by respondent's statement that "[i]n Michigan, petitioner's construction of Section 34a would permit it to indulge in a practically unlimited network of branching, since (on its view) petitioner could consolidate with other banks throughout the State and then claim the right to use the branching rights of those new constituent banks." Brief in Opp., n. 9, p. 14. The statement rests upon the erroneous assumption that if a national bank enjoys the statutory authority to consolidate or branch, it can use such authority at will. The facts are otherwise. Under the specific terms of both the consolidation and the branching provisions of the national banking laws, no expansion can be effected by any national bank until it has applied to, and received the economic approval of, respondent himself. 12 U.S.C. Sections 33, 36. No "unlimited network of branching", therefore, can be effected by petitioner, by means of consolidation or otherwise, except through a step-by-step procedure in which each step is examined and approved by respondent as being financially sound and in the public interest. Petitioner is not here ask-

ing for unrestricted power to establish new Michigan offices wherever it wishes; it is asking only that it be declared legally *eligible* to establish branches in such places as are or may become open to it pursuant to (a) the relevant statutes (12 U.S.C. Sections 34a, 36) *and* (b) the determinations of financial propriety to be made by respondent in the future.

CONCLUSION

Since the petition presents an important question of Federal law which has not been, but should be, settled by this Court, and since respondent has failed to show any valid reason why the question should not be so resolved, it is respectfully submitted that a writ of certiorari should issue to the Court of Appeals for the District of Columbia Circuit.

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